IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR.

J U D G M E N T

Smt.Rajesh Kumari Vs. Smt.Savitri Devi & Ors.

S.B. CIVIL FIRST APPEAL No.57/1987 against the judgment & decree dated dated 11.2.1987 passed by Shri Amar Singh Godara, District & Sessions Judge, Jhalawar in Civil Original Suit No.4/78 (Smt. Savitri Devi Vs. Bheru Lal & three others)

Date of Judgment :: August 22nd, 2006

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. U.N. Bhandari, Sr. Advocate with
Mr. L.L. Jain for the appellant-defendant.
Mr. S.M. Mehta, Sr. Advocate with
Mr. Anil Mehta for the respondent-plaintiffs.

BY THE COURT:

1. This appeal U/s.96 of the Civil Procedure Code is directed against the judgment and decree dated 11.2.1987 passed by the learned District & Sessions Judge, Jhalawar, Shri Amar Singh Godara, (as his Lordships then was) decreeing the Civil Original Suit No.4/78 (Smt. Savitri Devi Vs. Bheru Lal & others).

2. The facts giving rise to this appeal in brief are as under.

3. The residential property situated in Bhawani Mandi which is said to have been mortgaged by defendant Bheru

Lal with defendant nos.3 & 4 Shiv Narain and Kanhaiyalal with a right to repurchase for a sum of Rs.17,000/- on 3.4.1972 within a period of 5 years from the said date, is also stated to have been agreed to be sold by the said Bheru Lal in favour of plaintiff Smt.Savitri Devi wife of Sita Ram Singh and an Agreement to sell is alleged to have been executed on 17.10.1975 by the said Bheru Lal in favour of Smt.Savitri Devi in consideration of part sum of Rs.15,000/- paid on different occasions to the defendant Bheru Lal or his son Mohan Lal and Rs.5100/- remained to be paid. Within the aforesaid period of five years from the date of mortgage with a right to repurchase i.e. on 26.3.1977 by a registered sale deed, the aforesaid defendant nos.3 and 4 Shiv Narain and Kanhaiyalal sold the said property to Smt.Rajesh Kumari, the present appellant, daughter of defendant Bheru Lal.

4. A suit for specific performance was, therefore, filed by plaintiff Smt.Savitri Devi seeking direction to defendant Bheru Lal to execute the registered sale deed in pursuance of the Agreement to sell executed on 17.10.1975, Ex.5. The said suit was filed on 13.10.1978 and was decreed by the court below on 11.2.1987. Being aggrieved by the said judgment and decree, Smt.Rajesh Kumari, purchaser under the registered sale deed executed by the defendant Nos.3 and 4 Shiv Narain and Kanhaiyalal on 26.3.1977 has filed the present appeal in this court

on 31.10.1987 which was admitted on 6.5.1987 and the operation of the impugned judgment and decree was stayed by this court. In due course, the said appeal came up for hearing and was heard by this court on 18.8.2006.

5. Mr.U.N. Bhandari, Senior Advocate appearing for the appellant Smt.Rajesh Kumari vehemently urged that the learned trial court has grossly erred in decreeing the suit for specific performance in the absence of any clinching evidence proving the alleged Agreement to Sell dated 17.10.1975 Ex.5. According to him the said Agreement to Sell alleged to have been signed by Bheru Lal was in fact never executed by the said defendant and the plaintiff utterly failed to prove the said document as not only the signatory of the said Agreement to Sell, defendant Bheru Lal denied the same in his statement before the court but none of the witnesses of the said document like attesting witnesses Durga Shankar and Devinand Sharma have stated before the court that the said document was signed in their presence by defendant Bheru Lal. He submitted that in as much the said property was already mortgaged with defendant Nos.3 and 4 by the said Bheru Lal with a right to repurchase the same within a period of five years for the sum of Rs.17,000/- either by defendant himself or any of his legal heirs, therefore, the purchase through the sale-deed by the daughter of defendant Bheru Lal, Smt.Rajesh Kumari, the

present appellant on 26.7.1977 was unassailable. He further submits that even the plaintiff Smt.Savitri Devi did not categorically state that the said Agreement to Sell was signed in her presence by the defendant Bheru Lal. Giving background of the case, he submitted that in fact, son of defendant Bheru Lal, Dw-2 Mohan Lal was way ward son and was involved in speculation business with the husband of the plaintiff Smt.Savitri Devi, i.e. Sita Ram Singh and in the course of such speculation business, the various payments made in cash or through Hundies to the said son Mohan Lal were treated as consideration for alleged Agreement to Sell Ex.5 and the same son of defendant Bheru Lal, Mohan Lal only introduced the said plaintiff and her husband in two room portion of the property in dispute illegally and got forged the said Agreement to Sell, Ex.5 which was under undue influence and the said alleged Agreement to Sell was unenforceable against the appellant Smt.Rajesh Kumari, the bona fide purchaser for consideration and, therefore, suit of specific performance could not have been decreed by the learned trial court. He submitted that a bare eye comparison of signatures on Ex.5 with other documents bearing signatures of defendant Bheru Lal undertaken by the trial court in accordance with Section 73 of the Indian Evidence Act and returning findings on that basis was unsustainable in law in the facts & circumstances of the case and, therefore, no such decree could have been

granted in the face of registered sale-deed of the same property in favour of the appellant Smt.Rajesh Kumari, daughter of defendant Bheru Lal.

6. As against this, Mr. S.M. Mehta, learned Senior Advocate emphatically submitted that once the execution of document Ex.5, Agreement to Sell was admitted, the receipt of consideration of execution for such Agreement on various dates as mentioned in the said document itself should be deemed to have been admitted and since the plaintiff was always ready and willing to pay the balance sum of Rs.5100/- to the defendant Bheru Lal, in the absence of his executing the sale deed, the learned trial court was justified in decreeing the suit of specific performance directing him to do so and in the absence of the same, the court to execute such sale deed in favour of plaintiff. He also submitted that there was no need for the plaintiff to ask for declaring the registered sale deed in favour of the appellant Smt.Rajesh Kumari to be cancelled or set aside in view of enforceability of the Agreement to Sell Ex.5 document in the facts & circumstance of the case. He also urged that sale in favour of daughter vide registered sale deed dated 26.3.1977 was a collusive sale after the Agreement to Sell was executed by the defendant Bherulal in favour of plaintiff Smt.Savitri Devi on 17.10.1975. The same was done to undo the effect of Agreement to Sell in favour

of the plaintiff. He relied upon the judgments in **P.D.Souza Vs. Shondrilo Naidu** [(2004)6 SCC 649], **S.Gopal Reddy Vs. State of A.P.** [(1996) 4 SCC 596], **M.L. Devender Singh & others Vs. Syed Khaja** [AIR 1973 SC 2457], **Prakash Chandra Vs. Angadlal & others** [AIR 1979 SC 1241], **Kirpal Singh Vs. Smt.Kartaro & others** [AIR 1980 Rajasthan 212], **Jaswant Singh Vs. Issar Singh** [AIR 1959 Rajasthan 88], and **Mir Abdul Hakeem Khan Vs. Abdul Mannan Khadri** [AIR 1972 Andhra Pradesh 178] in support of his submissions and urged that the decree of specific performance granted in the present case deserves to be maintained. He also urged that mere claiming of alternative relief in the suit for specific performance by way of refund of sum of Rs.15,000/- with interest by the plaintiff to ensure the performance of the contract, could not come in the way of grant of decree in view of Section 20 of the Specific Relief Act, 1963. These judgments cited on this submission are of little avail to the respondents for the following reasons.

7. On the other hand Mr. U.N. Bhandari relied upon the judgments in **Dadarao & anr. Vs. Ramrao & ors**. [2000 WLC (SC) Civil 80], and **Tejram Vs. Patirambhau** {AIR 1997 SC 2702], are on the facts of those cases where decree for specific performance was refused by the court U/s.20 of the Act.

8. Having heard the learned counsel at length and given my anxious consideration to the pleadings, statements of various witnesses and relevant case laws, this Court is of the considered opinion that the present appeal deserves to be allowed and the decree and judgment under appeal deserves to be set aside.

9. It is well nay settled that a decree for grant of specific performance is a discretionary relief and not exactly statutory relief and, therefore, grant of such decree depending upon the facts and circumstances of each case mainly dwells in the realm of equity.[Savage Vs. Uwechia (1961)1 AIIER 830]. If on equitable considerations, the court finds that instead of granting decree of specific performance, other relief in the form of refund or damages claimed or not claimed by the plaintiff can be granted or where the document on the basis of which such specific performance is not fully and adequately proved to the satisfaction of the court, a decree of specific performance may not be granted by the courts just for askance particularly when it involves transfer of title in immovable properties. Section 20(2)(a) also negates exercise of such discretion to grant specific performance where the contract though not voidable, gives to the plaintiff an unfair advantage over the defendant.

10. From the facts, documents and statements of various witnesses available in the present case to this Court it appears more to be a case of a way ward son engaged in speculation business having lost money there tried to recoup the lender, husband of plaintiff in the present case and in the process sought to part with the ancestral property in which his father and other family members were living and which was already under mortgage from a point of time much prior to the alleged Agreement of sell in favour of the plaintiff, with a condition in the form of right to repurchase the same within 5 years of the said mortgage in favour of mortgagor Bherulal or any of his legal heirs who could pay the said sum at that time i.e. Rs.17,000/-.

11. The statements of Pw.7 Bhanu Prakesh Advocate who is alleged to have drafted the said document Agreement to sell Ex.5 is very relevant and important. He clearly admits in his examination-in-chief that the said document was drafted on the instructions of Mohan Lal son of defendant Bheru Lal and that there was a fight between the son Mohan Lal and father Bheru Lal after reading of the said document in his office and they left in a huff and the said document was not signed by defendant Bheru Lal in his presence. In his cross examination he admits that when the said fight took place by that time, the said document was not even fully written and was

incomplete. He also admitted in his cross examination that the averments relating to receipt of consideration part X to Y of the said document Ex.5 was written before the defendant Bheru Lal came to his office or afterwards was not remembered by him. According to him it is only after 5 to 10 days that both those persons Mohan Lal and Bheru Lal came to his office and collected the said document. Thereafter the same is produced as Ex.5 alleged to have been signed by the defendant Bheru Lal. Significantly none of the witnesses has categorically stated and proved that the said document was in fact signed by the defendant Bheru Lal in their presence. The executant defendant Bheru Lal himself has categorically denied the same. This Court, like the learned trial court also tried to compare the signatures of defendant Bheru Lal on Ex.5 and signatures on his Vakalatnama before the learned trial court and on his statements before the learned trial court for prima facie satisfying as to whether the signatures tally or not. Though it would require a hand writing expert after careful and close examination and chemical analysis if necessary to give an expert opinion whether the signatures are by the same person or not but to the bare eyes, the signatures at different places do not exactly tally and, therefore, the alleged signatures C to D on Ex.5 document by the defendant Bheru Lal does not inspire confidence at all. Moreso when the attending circumstances of the case in

which the said Agreement to sell is said to have been executed, also cast a serious doubt over the veracity and truthfulness of the said document Ex.5. A look at the details of receipt of consideration of Rs.15,000/- in the said document Ex.5 and reiterated in the plaint also is of some relevance here. The said sum of Rs.15,000/- paid for execution of the said Agreement to sell is in the following manner:-

(i)Rs.11,000/- on 1.11.1974 (whether in cash or by cheque not mentioned and to whom paid is also not mentioned).

(ii) Rs.2,000/- on 1.1.1974 paid by Sita Ram Singh to Mohan Lal (presumably in cash– in Ex.5 document the said Rs.2,000/- is said to be against promissory note executed by Mohan Lal son of defendant Bheru Lal, though the word promissory note was not mentioned in the plaint).

(iii) Rs.1,000/- against Hundi, Rs.950/- against another Hundi of one Dalu Ram Bhagwan Das. Rs.50/- in cash on 17.10.1975 thus totaling to Rs.15,000/-.

12. The scattered manner and the disparity in the different sums paid in different manners and mostly to Mohan Lal and never specifically to defendant Bherulal casts a serious doubt whether such consideration was paid to defendant Bherulal at all for purchase of property in question which was admittedly an ancestral property of which 'karta' was Bheru Lal, father of the said person Mohan Lal at the relevant point of time and there being no contradiction of the version coming before the court that the said Mohan Lal and husband of the plaintiff were involved in speculation businesses, in such circumstances, bona fides of an Agreement to sell executed by karta of a family of an ancestral property is under serious cloud of doubt and in such circumstances grant of specific performance by the learned trial court cannot be said to be a fair use of discretion in the face of other contesting and genuinely proved evidence in the form of earlier mortgage dated 3.4.1972 Ex.7 and subsequent registered sale deed dated 26.3.1977 Ex.6 in favour of the appellant Smt. Rajesh Kumari.

13. Consequently, this appeal deserves to be allowed and the same is accordingly allowed and the judgment under appeal and decree dated 11.2.1987 are set aside and the plaintiff is held not entitled to any right, title or interest in the said property in question and, therefore, if the plaintiff is still in possession of the said

portion of the property in some manner or the other, the plaintiff shall hand over back the vacant possession to the appellant defendant Smt. Rajesh Kumari forthwith. No order to costs.

(Dr.VINEET KOTHARI),J.

VS/